IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
O'Brien, PJ, and Gleicher and Stephens, JJ

THE COUNTIES OF INGHAM, JACKSON, and CALHOUN, Municipal corporations and bodies politic and corporate,

Plaintiffs-Appellees,

v

THE MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL, an unincorporated voluntary association,

Defendant-Appellant.

Supreme Court Docket No. 160186

Court of Appeals Docket No. 334077

Ingham County Circuit Court
Case No. 15-432-NZ

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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Introduction

The Michigan County Road Commission Self-Insurance Pool is—and always has been—governed by its controlling documents, including a Declaration of Trust, By-Laws, and an Inter-Local agreement signed by all its members. Those documents, taken together, limit membership in the Pool to "county road commissions" and make clear that members who withdraw from the Pool forfeit any claim to surplus-equity distributions. Here, the Court of Appeals wrongly declined to give effect to either of those aspects of the Pool's governing documents.

First, the Court of Appeals said that the Pool and its members cannot exclude a county from membership because a county effectively "becomes" a county road commission by dissolving its road commission or, at minimum, becomes a contractual successor-in-interest to the dissolved entity. Not so. The statute that gave counties authority to dissolve their road commissions and transfer their statutory rights and obligations has nothing to do with the former road commissions' contractual rights or obligations as a Pool member. So, the Pool's contractual documents control. Furthermore, the plain meaning of "county road commission" is different than "county." And this distinction is recognized by the intergovernmental-insurance-pool statutes, the county-road-law statutes, and the Pool's governing documents. Accordingly, none of the plaintiff counties are eligible for Pool membership, Ingham County and Calhoun County withdrew from the Pool upon executing their withdrawal agreements, and Jackson County effectively withdrew from the Pool when it dissolved its road commission, even though Jackson County did not execute a withdrawal agreement.

Second, the Court of Appeals erred by holding that the Pool's forfeiture provision was void as against public policy. Under this Court's case law, a contract is only void if it conflicts with public policy that is "explicit" or "clearly rooted" in a statute or other law. Here, the public policy that the Court of Appeals relied on to void the Pool's governing documents isn't "clearly

rooted" in any of the statutes identified in its opinion. And neither the Pool's governing documents nor its withdrawal policy actually conflict with any relevant statute. So they should be applied as written (which, as the Court of Appeals recognized, means that the Counties aren't entitled to surplus equity distributions). That's an eminently sensible result given the nature of an insurance pool. When an insurance pool's members make annual premium payments, they're not paying for a right to future surplus distributions; there may never be a future surplus, or the pool may elect to assign any future surplus to reserves, to cover future claims and reduce premiums. Rather, pool members make premium payments to obtain insurance coverage. And no one disputes that the plaintiff counties' predecessors-in-interest road commissions received the insurance coverage for which they paid.

In sum, the Court of Appeals' holding is based on multiple legal errors. And, since the court's opinions were both published, those errors tore Michigan's legal fabric. This Court should reverse those errors or, alternatively, grant the Pool's application for leave to appeal.

Statement of Facts

A. The Michigan County Road Commission Self-Insurance Pool

The Pool is an intergovernmental insurance pool under MCL 124.5(1). The Pool, and its relationship with its members, is governed by (i) a Declaration of Trust, (ii) By-Laws, and (iii) Inter-Local Agreements signed by each member. (Trust, App'x at 0001a; By-Laws, App'x at 0014a; Inter-Local Agreement, App'x at 0031a). Every member executed the Trust and Inter-Local Agreement or "otherwise agree[d] to become bound by and comply with the By-Laws, rules and regulations of the Pool." (Inter-Local Agreements at 2, ¶1, App'x at 0034a). And, every member agreed to make annual "contributions," i.e., premium payments, that the Pool set aside for the payment of claims, operating and administrative expenses, and other enumerated things. (*Id.* at 2-4, App'x at 0034a – 0036a).

The Declaration of Trust "created" the Pool, and it vests the Pool's Directors with authority to supervise and operate the Pool and "conduct the business and activities of the [Pool] in accordance with [the]… Trust, the By-Laws…, rules and regulations adopted by the Trustees," and applicable laws. (Trust, App'x at 0001a). Among other things, the Trust authorizes the Pool Directors to adopt By-Laws that govern "the operation and administration of the [Pool]" (*Id.* at 3, Article IV, Sec. 1, App'x at 0004a) and gives the Directors broad discretion in determining whether to distribute surplus equity, *including the right to treat former members "differently and less favorably" than they "treat members who continue in the trust for future years."* (*Id.* at 5, Article VI, Sec. 9(f), App'x at 0006a (emphasis added)).[1] Every Pool member understands this.

The Pool's By-Laws also address issues relating to "contributions and refunds" (By-Laws at 14, Article X, App'x at 0028a). Specifically, they authorize the Board to "develop procedures for addressing accumulated equity, if any, or [any] accumulated funding deficienc[ies]." (*Id.* at 15, Article XII, App'x at 0029a).[2] The Inter-Local Agreements also address the surplus-equity

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[1] The relevant portion of the Declaration of Trust (Art. VI, §9), App'x at 0006a, reads:

The Board of Directors shall set aside from the premiums collected during each fiscal year a reasonable sum for the operating expenses or administrative expenses of the Trust for that year. All remaining funds coming into its possession or under its control with respect to that fiscal year of the Trust shall be set aside and should be used only for the following purposes:
* * *
(f) distribution among the members during that fiscal year in such manner as the Members of the Board of Directors shall deemed to be equitable...*The Board of Directors may treat members who withdraw from future Trust Years differently and less favorably than they treat members who continue in the trust for future years.* (emphasis added).

[2] The relevant portion of the By-Laws (Article XII), App'x at 0029a, provides:

Any Member may withdraw from the Pool by giving at least sixty days written notice to the Pool Board of its desire to so withdraw. *The Pool Board shall develop procedures for addressing accumulated equity, if any, or accumulated funding deficiency*. The Pool Board shall determine the short rate cancellation penalty for terminating prior to the annual renewal date. A Member

issue and vest the Pool Board with the express authority *to treat withdrawn members "differently and less favorably" than those that stay members of the Pool*. (Inter-Local Agreement at 3-4, ¶3H, App'x at 0035a – 0036a (emphasis added)).[3] Surplus equity distributions are only available to current members.[4] And, nothing in Declaration of Trust, By-Laws or Inter-Local Agreements provides that distributions are ever guaranteed. Each of the three counties' predecessor-in-interest road commissions were aware of all these rules from the Pool's inception.

B. Ingham County

1. Ingham County dissolved its Road Commission.

As early as December 12, 2011, Ingham County planned to dissolve its Road Commission if the Legislature enacted then-pending legislation that allowed the County to do so. (12/13/11 Ingham County Resolution, App'x at 0046a). Its reasons had nothing to do with future

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may be terminated from membership by a two-thirds vote of the Members present at an annual or special meeting of the Members… . (emphasis added).

[3] The relevant portion of the Inter-Local Agreement (paragraph 3H), App'x at 0035a, provides:

The Member agrees to pay contributions which shall be calculated according to the method determined by the Pool Board. …The Pool shall set aside from the premiums collected during each fiscal year a reasonable sum for the operating expenses or administrative expenses of the Pool for that year. All remaining funds coming into the possession of the Pool with respect to that fiscal year of the Pool shall be set aside and shall be used only for the following purposes:
* * *
H. Distribution among the members during that fiscal year in such manner as the Pool shall deem to be equitable, of any excess monies remaining after payment of all claims and expenses and after provision has been made for open claims and outstanding reserves and a reserve for claims incurred but not reported; provided, however, that no such distribution shall be made earlier than twelve (12) months after the end of each Pool Year; and provided, further, that undistributed excess funds from previous Pool Years may be distributed at any time if not required for loss funding and if approved for distribution by applicable boards and authorities. *The Pool may treat members who withdraw from future Pool Years differently and less favorably than the Pool treats members who continue in the Pool for future years*. (Emphasis supplied).

[4] See the Pool's twelve-factor methodology announced by the Board in 1990 and followed thereafter. (MCRCSIP Refund Overview, App'x at 0043a). The Court of Appeals said this was not properly introduced, and it is not to be considered.

Pool distributions but rather a history of problems between the County and the Road Commission. (*Id.*). Ingham County examined its insurance options if it dissolved its Road Commission, and the County knew it would not be able to continue as a Pool member without a bylaw amendment. (Ingham County Emails re: need for By-Law Amendment, App'x at 0049a; 4/18/12 Ingham County Finance Committee Minutes, App'x at 0054a). The County continued evaluating the issue throughout the winter of 2012. (Ingham County Emails re: Amending By-Laws, App'x at 0049a; 2/24/12 Email Chain, App'x at 0062a). As of the Spring of that year, the County planned to insure with the Michigan Municipal Risk Management Authority ("MMRMA"), the County's general insurer, and inquired about surplus distributions. (Pool/Ingham Email Chain, App'x at 0076a; 3/6/12 Ingham County Proposed Calendar, App'x at 0079a; 3/6/12 Ingham County Controller Memo, App'x at 0082a). As early as April 2012, Ingham County knew that if the Ingham County Road Commission was not a member of the Pool, "[it would] not receive any refunds for previous years which the pool may close out in the future with savings refunds distributed back to the members." (4/4/12 Email Chain and 4/5/12 Email, App'x at 0095a). Knowing this, Ingham County passed a resolution in late April 2012 that dissolved[5] its Road Commission effective June 1, 2012. (4/24/12 Ingham County Resolution, App'x at 0115a). A second resolution authorized the County Board to "take whatever steps are prudent and necessary to withdraw from the existing ICRC insurance carrier, the Michigan Road Commission Self Insurance Fund [sic]." (Additional Paragraphs of 4/24/12 Ingham County Resolution, App'x at 0117a).

[5] The Counties admit they dissolved their Road Commission. See (Complaint, ¶12, App'x at 0103a).

2. Before that dissolution took place, the Ingham County Road Commission withdrew from the Pool.

On Friday, May 25, 2012, the Pool's Administrator, Gayle Pratt, advised William Conklin, the Ingham County Road Commission's Managing Director, that the Pool would not insure the County after June 1 (which did not harm the County since it had already secured coverage through MMRMA).[6] Ms. Pratt forwarded insurance Cancellation and Termination Agreements that, in Ingham County's[7] own words, "basically spell[ed] out the reimbursement of pre-paid premium and continuation of handling currently open claims." (5/29/12 Email Chain, App'x at 0155a). Ingham County forwarded the Agreements to their attorneys, the same ones who represent them here, stating: "We added the Department of Transportation and Roads to our MMRMA policy effective June 1, 2012 a few weeks ago and confirmed again today we are covered." (5/30/12 Email Chain A, App'x at 0159a).

Bonnie Toskey, the counties' lead attorney here, negotiated the language of the Cancellation and Termination Agreements with the Pool,[8] and approved them for signature. (*Id.*).

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[6] Perhaps anticipating more dissolutions (which would undermine the stability of the pool if counties could not be members), on May 29, 2012, the Pool sent a letter to its Members stating that the Board unanimously recommended allowing counties with road responsibilities to become members of MCRCSIP. (5/29/12 Correspondence, App'x at 0119a). The MCRCSIP Board sent Supplemental Information to its members, including (i) the impact of attrition, (ii) the impact on the development of the law, (iii) cost of doing business, (iv) increased competition (including a specific reference to MMRMA providing a competitive rate to Ingham County). *Id.*, Supplemental Information. But, this was only a recommendation. The ultimate decision was made by the members.

[7] When the Road Commission was dissolved, Mr. Conklin became the head of the new County Road Department.

[8] The changes to the Termination Agreement included (i) specifying that the Road Commission would be dissolved, and "by operation of law" "is not eligible" to be a Member of the MCRCSIP, (ii) the Commission and MCRCSIP agree that the Commission "is not eligible to participate" as a member as of June 1, 2012, (iii) termination would be "concurrent with the termination of the Ingham County Road Commission" as of June 1, 2012; (iv) MCRCSIP would service claims arising from incidents or events prior to June 1, 2012, and (v) "The exception shall be the Employment Practices & Public Officials Errors and Omissions Liability Agreement which is a claims made policy / coverage only." *Id.* at Termination Agreement. Toskey proposed

During the negotiations, Toskey double-checked to confirm that the Pool would still provide coverage for claims before June 1, 2012. (5/30/12 Email Chain B, App'x at 0174a). Both Pratt and Toskey agreed that Conklin should sign the Agreements. (5/30/12 Email Chain re: Conklin will execute Agreements, App'x at 0188a).

At some point before 3:16 pm on May 31, 2012, Pratt and Toskey had a conversation about withdrawing Pool members. In follow up, Pratt sent Toskey a letter that confirmed the following: "A withdrawing Member *forfeits any and all rights to dividends, credits and/or accumulated interest that is to be paid or shall become payable after the effective date of the Member's withdrawal from the Pool*." (5/31/12 Email Chain re: 1990 letter, App'x at 0191a) (emphasis added).) After receiving that information, Toskey forwarded the Agreements to Conklin for signature. (5/31/12 Email Chain re: Withdrawal/Cancellation Agreements, App'x 0197a; Ingham County Withdrawal Agreement, App'x 0167a; Ingham County Cancellation of Insurance Agreement, App'x 0170a).

The Cancellation Agreement specifically noted that "[b]ecause, as of June 1, 2012, the Commission being non-existent will no longer be a member of the [Pool] or a road commission within the meaning of the applicable By-Laws and the Inter-Local Agreement that govern membership in the [Pool], the [Pool] will not be able to issue insurance coverage to the Commission after it is dissolved." (Ingham County Cancellation Agreement, App'x 0170a). And

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these changes to the Cancellation Agreement: (i) specification that the Commission would be "non-existent" as of June 1, 2012; (ii) insurance coverage would be "terminated concurrent with the termination of the Ingham County Road Commission" on June 1, 2012; (iii) MCRCSIP would service claims arising from incidents or events prior to June 1, 2012 and (iv) "The exception shall be the Employment Practices & Public Officials Errors and Omissions Liability Agreement which is a claims made policy / coverage only." (5/30/12 Email Chain A, App'x at 0159a) Ultimately, all but the last change was incorporated into the final agreements. (Ingham County Withdrawal Agreement, App'x 0167a; Ingham County Cancellation of Insurance Agreement, App'x 0170a).

it specified that the purpose of the Agreement was to effectuate termination of insurance immediately after dissolution even though the notice period would be violated. *Id.* The parties also exchanged the following documents: (i) a mutual waiver of the notice period and associated release; (ii) an agreement regarding the cancellation date; (iii) a date for the contribution adjustment; and (iv) arrangements regarding existing claims.

3. Ingham County demands a refund of insurance premiums and surplus equity payments. Consistent with its governing documents, the Pool denies the request.

Wasting no time, on June 1, 2012, Jill Rhode, Director of Financial Services at Ingham County wrote Ms. Pratt, requesting a refund of insurance "premiums," and in a separate letter, requested surplus payments. (6/1/12 Insurance Premium Refund Request, App'x 0200a; 6/1/12 Surplus Equity Payout Request, App'x 0202a).[9] The Pool agreed to refund the unused pro-rata portion of the contribution, but it denied the request for a surplus refund." (6/25/12 Response to Requests for Premium Refunds/Surplus Payouts, App'x 0204a).

C. Jackson County

1. Jackson County thoroughly analyzed whether to dissolve its Road Commission.

As early as March 2012, Jackson County was also evaluating whether it should assume the power of the Jackson County Road Commission. (3/20/12 Jackson County Email Chain, App'x 0208a). Insurance coverage was an issue from the beginning. *Id.* In August 2012, after the Pool rejected a proposed by-law amendment that would have allowed counties to become Pool members, an ad hoc committee analyzed the benefits of transferring power from the Road Commission to the Board of County Commissioners. (8/10/12 Jackson County Feasibility Study, App'x 0215a). In October, Jackson County also analyzed the value of future equity distributions. (10/18/12 Email Chain, App'x 0231a). Throughout the fall, the Ad Hoc Committee held a series

[9] It is unclear whether this was sent because it is not on letterhead.

of hearings, during which the committee members conducted interviews, received public comment, gathered survey data, and discussed the pros and cons of transferring power. (Jackson CRC Ad Hoc Committee Agenda and Survey, App'x 0234a).

The Pool assisted Jackson County with its analysis by providing information about the Pool. (10/10/12 Summary of MCRCSIP Info, App'x 0272a). Jackson County conducted its own investigation into available insurance and fully recognized that it would not be eligible for membership in the Pool. (10/22/12 Email Chain, App'x 0278a; 10/18/12 Jackson CRC Ad Hoc Committee Meeting Minutes at 6, App'x 0287a). *Jackson County also knew that ending a relationship with the Pool meant walking away from approximately nine years of potential future surplus distributions*. (10/18/12 Jackson CRC Ad Hoc Committee Meeting Minutes at 6, App'x 0287a; 11/29/12 Jackson CRC Ad Hoc Committee Meeting Minutes at 2, App'x 0291a ("The Administrator / Controller confirmed that we would lose it from the Road Commissions current insurance carrier *[sic]*. The new insurer would also have a year-end dividend.")).

In October 2012, Jackson County shared the Road Commission's then current insurance policy with MMRMA, requesting a quote. (*Id.*) In response, MMRMA compared the two policies, identifying the differences to the County. (12/13/12 Email Exchange, App'x 0294a; 11/29/12 Email Exchange, App'x 0297a). On December 6, 2012, the final version of a "Feasibility Study for County Operation of Jackson County Road Commission" was sent to the County Administrator. (12/6/12 Email re: Final Feasibility Study, App'x 0308a). This document describes various reasons for the County transferring the powers of the County Road Commission, including (i) $50,000 recurrent savings on personnel costs; (ii) $130,000 annual savings on insurance premiums; (iii) increased insurance rebate ($200,000 compared to $160,000); (iv) centralized decision making; (v) single point of service; (vi) less internal conflict

among staff; and (vii) improved communication.(*Id.* at 5, 7, 9-14, App'x 0314a, 0316a, 0318a – 0323a; see also 10/18/12 Brennan Correspondence, App'x 0327a (identifying various concerns about the Jackson County Road Commission). *The Report also confirmed that Jackson County was aware of the Pool members' decision not to allow Counties to participate in the Pool or receive surplus distributions*. (*Id.* at 7, App'x 0316a; see also 12/21/12 Jackson CRC Confidential Update, App'x 0331a).

2. Jackson County dissolves its Road Commission.

Jackson County held the requisite public hearings regarding the proposed transfer on January 4, 2013, and January 18, 2013. (12/23/12 Public Notice re: Jackson CRC Dissolution, App'x 0350a). After the first hearing, the County Administrator/Controller prepared a memorandum to the Board of County Commissioners requesting that the "resolution to assume the powers and duties of the Jackson County Road Commission" proceed to ballot at the next public hearing. (1/8/13 Correspondence re: Public Hearing on Dissolution, App'x 0352a). In doing so, Jackson County was aware that it would need to immediately change insurance carriers. (2013 Jackson CRC Transition Plan, App'x 0356a). The County Administrator had already decided to insure through MMRMA if the Jackson County Road Commission was dissolved. (1/18/13 Email Exchange, App'x 0359a; 12/17/12 Email Exchange, App'x 0376a; 1/15/13 Email, App'x 0499a).

3. Despite being dissolved, the Jackson County Road Commission apparently never signed a withdrawal agreement.

The same day power was transferred, Pratt forwarded Cancellation and Termination Agreements to the Jackson County Road Commission. (1/18/13 Email Exchange, App'x 0359a). Although there is no evidence that the Road Commission executed those documents, no one disputes that the Jackson County Road Commission was dissolved and ceased existence.

D. Calhoun County

As early as April 2012, Calhoun County was also considering dissolving the Calhoun County Road Commission. (Calhoun County Documents, App'x 0501a; Calhoun CRC Transition Plan Draft 1, App'x 0568a). It assembled a task force that undertook a thorough investigation that included completion of a comprehensive financial analysis that contained a comparison of available insurance. (Calhoun County Documents at Appendix D-E, App'x 0514a – 0540a). The analysis showed that *Calhoun County knew that future surplus distributions would only be given to current Pool members*, and that it wasn't eligible for membership without a bylaw change. (*Id.* at Appendix E, p. 3, App'x 0518a).

Part of Calhoun's motivation was financial savings. (*Id.*). Other reasons included poor road conditions and management issues. (*Id.*, Appendix H, App'x 0554a). After it completed its investigation, the Task Force unanimously voted to recommend dissolution of the Road Commission. (*Id.*, Appendix H, App'x 0554a). By August 31, 2012, a Transition Plan was drafted. (Calhoun CRC Transition Plan Draft 1, App'x 0568a). In preparing that Plan, liability insurance was considered, and MMRMA represented that it would transfer coverage to the County's policy. (*Id.* at 7, App'x 0575a).

During the second requisite public hearing, a resolution passed that "dissolved" the Calhoun County Road Commission effective November 1, 2012. (*Id.*, Appendix I, App'x 0561a). A separate resolution was passed to establish the Calhoun County Road Department. (*Id.*, Appendix I at p 2, App'x 0562a). And a third resolution passed whereby the County *specifically agreed* to undertake certain contractual obligations of the Road Commission and *chose not to* assume other contractual obligations. (*Id.*, Appendix I, p 4-5, App'x 0564a – 0565a). These three resolutions directly undermine any contention that the County simply "stepped into the shoes" of

its Road Commission. And, before the county dissolved it, the Calhoun County Road Commission withdrew from the Pool. (Calhoun Withdrawal Agreement, App'x at 0805a).

E. The Trial Court granted summary disposition for the Pool.

The Counties filed this lawsuit in May 2015. (Complaint, App'x at 0098a). They raised four claims: Count I - Unlawful Actions in Violation of Article 9, §18 of the Michigan Constitution of 1963; Count II – Extortion; Count III – Statutory Conversion/ Embezzlement – Treble Damages Under MCL 600.2919a; and Count IV – Breach of Contract. (*Id.*)

After conducting discovery, the Counties moved for summary disposition as to liability under MCL 2.116(C)(9) and (10). (The Counties' Summary Disposition Motion, App'x at 0578a). The Counties argued that: (1) they are "as a matter of law, also the Road Commissions of Ingham, Jackson and Calhoun Counties"; (2) the Pool's refusal to include the Counties in subsequent surplus equity distributions violated Const 1963, Art 9, §18. (*Id.* at 8, 17, App'x at 0595a, 0604a). The Counties also argued, in the context of contending that the Pool's actions constituted extortion, that the Pool's decision to treat former members differently for surplus equity distribution purposes was contrary to public policy articulated in MCL 224.6(7), MCL 46.11(s), and MCL 750.213. (*Id.* at 26, App'x at 0613a).

In response, the Pool argued that it was entitled to summary disposition under MCR 2.116(I)(2) because: (1) counties aren't road commissions, and MCL 224.6(7) doesn't change that; (2) under the Pool's governing documents, only road commissions can be members; (3) the Counties can't use the contract clause in Michigan's constitution to force the Pool to contract with them; (4) the Counties aren't successors-in-interest to their dissolved road commissions and, even if they were, they are entitled to the same thing—nothing; (5) the Pool can treat former members differently than current members under Michigan law, and the Pool did not commit

extortion by doing so. (See generally, The Pool's Summary Disposition Response, App'x at 0617a).

After hearing oral arguments, the trial court dismissed each of the Counties' four claims in a lengthy, and well-reasoned Opinion. (Summary Disposition Opinion, App'x at 0638a). As an initial matter, the court concluded that the Pool did not violate Article 9, § 18 of the Michigan Constitution because neither the Counties nor the road commissions they dissolved loaned their credit to the Pool. (*Id.* at 13, App'x at 0651a) The money those commissions paid to the Pool was a fair exchange of value for insurance coverage. (*Id.*) In addition, neither the Counties nor the dissolved road commissions gave up property, because refund distributions from the Pool "to its members [were] *not* guaranteed." (*Id.* at 14, App'x at 0652a (emphasis added).)

The trial court also concluded that the Pool was not guilty of extortion. MCL 750.213. (*Id.*) There was no evidence in the record that the Pool acted with malice, and "the record clearly show[ed] that Plaintiffs were aware and fully cognizant of the fact that dissolution of their respective road commissions would result *in not being entitled to potential future refunds*." (*Id.* at 15, App'x at 0653a (emphasis added).)

Moreover, the trial court concluded that there was no merit to the Counties' conversion and embezzlement claims. (*Id.* at 16, App'x at 0654a). Conversion requires an obligation to return or deliver money by someone who has been entrusted with it. Here, in contrast, "the record show[ed] that Plaintiffs and their former road commissions were fully cognizant of the fact that dissolution of the former road commissions would result in the forfeiture of future surplus refunds." (*Id.* at 16-17, App'x at 0654a – 0655a).

Finally and most importantly, the trial court concluded that the Counties' breach-of-contract claim failed because (i) surplus distributions were not guaranteed, (ii) the Counties'

former road commissions knew beforehand that dissolution and withdrawal would result in the forfeiture of potential future surplus refunds, (iii) each of the County plaintiffs chose to voluntarily withdraw from the Pool and (iv) the Counties couldn't sue for breach of contract in any event because they never contracted with the Pool for anything. (*Id.* at 17-18, App'x at 0655a – 0656a).

F. The Court of Appeals reverses in a published opinion (*Ingham County I*).

In a published opinion, the Court of Appeals reversed, but only with respect to the Counties' breach-of-contract claim. *County of Ingham v Michigan County Road Commission Self-Insurance Pool*, 321 Mich App 574; 909 NW2d 533 (2017) (*Ingham I*, App'x at 0657a). It never addressed the other dismissed claims. *Ingham County I* held that the Counties were "successors in interest" to the contractual rights of their dissolved road commissions and, directly contrary to the Pool Bylaws, were "eligible" for Pool membership. (*Id*. at 3-5, App'x at 0660a – 0662a). But the Court of Appeals did more than that. It also ruled that, because the Counties were successors in interest, they were "entitled" to surplus equity distributions going forward. (*Id.* at 5-6, App'x at 0662a – 0663a). The Court of Appeals reached that conclusion summarily, without explaining how the Counties could be entitled to discretionary distributions, or how or why the Counties were entitled to that contractual relief even though their predecessors in interest (the dissolved and withdrawn road commissions) were not entitled to receive any surplus-equity distributions.

G. On remand from this Court (*Ingham County II*), the Court of Appeals reverses based on an argument that was never raised by the parties (*Ingham County III*).

Responding to the Pool's first Application for Leave, this Court, in lieu of granting leave, remanded the case to the Court of Appeals to consider an issue it had not addressed. Specifically, the Court of Appeals was directed to review certain of the Pool's operative documents and assess

whether, "even if the . . . Counties [were] successors in interest . . ., the [Pool]" could nonetheless "decline to issue . . . refunds of surplus premiums from prior-year contributions." (*Ingham County II* at 917, App'x at 0665a).

In conducting that review, the Court of Appeals readily agreed that, under the clear language in the Pool's governing documents, withdrawing road commissions were *not* entitled to any refunds. *County of Ingham v Michigan County Road Commission Self-Insurance Pool*, 329 Mich App 295; 942 NW2d 85 (2019) (*Ingham County III*, Slip Op at 13, App'x at 0679a). But, despite that conclusion, the Court of Appeals nonetheless refused to enforce the Pool's withdrawal policy, inter-local agreements, and Declaration of Trust because, in its view, they were contrary to the public policy articulated in MCL 124.5(6), MCL 224.6(7), and MCL 500.2016. (*Id*. at 14-15, App'x at 0680a – 0681a).

H. This Court's MOAA order.

This Court issued a MOAA order in September 2020 directing the parties to brief three issues related to the Plaintiff Counties' status as successors in interest, the Counties' eligibility to be Pool members, and, if properly preserved, whether the Pool's documents are void as against public policy. (MOAA Order, App'x at 0683).

Standard of Review

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law."[10] In making that determination, this Court reviews "the entire record" to determine if summary disposition is appropriate.[11]

[10] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).
[11] *Id.*

Argument

I. The Plaintiff Counties are not successors-in-interest to their dissolved road commissions and are not entitled to surplus-equity distributions in any event.

A. For purposes of Pool membership, the Counties are not successors in interest to their road commissions.

MCL 224.6 requires counties that have adopted county road systems to establish county road commissions. These commissions may be either elected or appointed.[12] Once established, county road commissions are separate legal entities from the counties in which they were formed.[13] In 2012, the Legislature amended MCL 224.6 to include subparagraph (7), which allowed counties to dissolve road commissions and transfer their "powers, duties, and functions" to the county board of commissioners. But the Legislature did not change the fact that counties and road commissions are separate and distinct legal entities. The new provision states:

> . . . Before January 1, 2020, the *powers, duties, and functions that are otherwise provided by law* for an appointed board of county road commissioners *may be transferred* to the county board of commissioners by a resolution as allowed under section 11 of 1851 PA 156, MCL 46.11. The appointed board of county road commissioners of that county *is dissolved* on the date specified in the resolution adopted under this subsection, and the *county board of commissioners* is authorized to receive and expend funds as allowed under 1951 PA 51, MCL 247.651 to 247.675.[14]

Under this language, (1) a board of county road commissioners may be "dissolved" (i.e., they cease to exist); (2) their statutory "powers, duties, and functions that are otherwise provided by law" may transferred to the county; and (3) the "county board of commissioners" are authorized to "receive and expend funds" as otherwise allowed for a road commission. There are

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[12] MCL 224.6(1)-(4).
[13] See MCL 45.1 (county is a geographic political subdivision of the State); MCL 45.3 (county is "a body politic and corporate" for a variety of purposes besides managing a road system); see also MCL 46.11; MCL 224.1 *et seq.* ("county road commission" is a board of county road commissioners elected or appointed under MCL 224.6 that manages the county road system).
[14] MCL 224.6(7).

several reasons why this language does not make the Counties successors-in-interest to their respective road commissions for the purposes of the Pool—or their purported entitlement to any refunds or surplus equity distributions.

First, as a threshold matter, the Counties aren't road commissions, and the statutory language does not recast the county board of commissioners as a "board of county road commissioners."[15] In the act governing county road law, the Legislature refers separately to a "board of county road commissioners" and a "county board of commissioners."[16] Likewise, in the act that governs intergovernmental contracts between municipal corporations, the Legislature refers separately to a "county" and a "county road commission."[17] The Legislature's decision to use different phrases—"county" versus "county road commission" and "county board of commissioners" versus "board of county road commissions"—demonstrates its intent that those phrases mean different things.[18]

Furthermore, the Legislature has demonstrated that it is capable of defining "county road commission" as including the county board of commissioners in a county with a road commission dissolved under MCL 224.6(7) because it has done so in four different statutes.[19]

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[15] As shown below, the Legislature could have done so, but chose not to.
[16] MCL 224.6(1)-(4); MCL 224.8 (same).
[17] MCL 124.1(a).
[18] *United States Fidelity Ins. & Guaranty Co. v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14, 795 NW2d 101 (2009) ("When the Legislature uses different words, the words are generally intended to connote different meanings."); *Reading Law*, § 25; see also 2A Sutherland, *Statutes and Statutory Construction*, § 46:6, p 261 ("Different words used in the same, or a similar, statute are assigned different meanings whenever possible."); *Reading Law*, p 170 ("A word or phrase is presumed to bear the same meaning through a text; a material various in terms suggests a variation in meaning.")
[19] MCL 45.514a(5)(a) (stating that "[a]s used in this section" the term "County road agency" means a county road commission or a body that has the powers of a county road commission in a county that adopts a charter under this act. In addition, if a board of county road commissioners of a county is dissolved as provided in section 6 of chapter IV of 1909 PA 283, MCL 224.6, county road commission includes the county board of commissioners of that county."); MCL

However, those definitions do not affect the meaning of MCL 224.6(7)—and, thus, do not control the outcome of this issue—because each one is specifically limited to a different section or Act.[20] And, the Legislature's decision to omit language in MCL 224.6(7) that it included in other statutes cannot be viewed as unintentional or inadvertent.[21] Indeed, to overlook that

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247.660c(p) (stating that "[a]s used in this act" the term " 'County road commission' means the board of county road commissioners elected or appointed pursuant to section 6 of chapter IV of 1909 PA 283, MCL 224.6, or, in the case of a charter county with a population of 750,000 or more with an elected county executive that does not have a board of county road commissioners, the county executive for ministerial functions and the county commission provided for in section 14(1)(d) of 1966 PA 293, MCL 45.514, for legislative functions. In addition, if a board of county road commissioners is dissolved as provided in section 6 of chapter IV of 1909 PA 283, MCL 224.6, county road commission includes the county board of commissioners of the county."); MCL 45.554a(5)(a) (stating that "[a]s used in this section" the term " 'County road agency' means a county road commission in a county that adopts an optional unified form of county government under this act. In addition, if a board of county road commissioners of a county is dissolved as provided in section 6 of chapter IV of 1909 PA 283, MCL 224.6, county road commission includes the county board of commissioners of that county."); MCL 224.19b(13)(a) (stating that "[a]s used in this section" the term " 'County road commission' means the board of county road commissioners elected or appointed pursuant to section 6 of this chapter, or, in the case of a charter county with a population of 750,000 or more with an elected county executive that does not have a board of county road commissioners, the county executive for ministerial functions and the county commission provided for in section 14(1)(d) of 1966 PA 293, MCL 45.514, for legislative functions. In addition, if a board of county road commissioners is dissolved as provided in section 6 of this chapter, county road commission includes the county board of commissioners of the county.")

[20] *People v Mazur*, 497 Mich 302, 314-315; 872 NW2d 201 (2015) ("By specifically limiting the applicability of this definition to certain statutory provisions, the Legislature expressed a clear intent that the definition should not be applied elsewhere."); *Woodard v Custer*, 476 Mich 545, 563-564; 719 NW2d 842 (2006); *Wrigley's Stores, Inc v Mich Bd of Pharm*, 336 Mich 583, 590; 59 NW2d 8 (1953) ("P.A.1909, No. 146, above referred to, in setting forth its definition of the word drug, gave that definition with the restriction, 'The term 'drug' as used in this act', so that the legislature must be understood to have limited the definition as contained in Act No. 146 to the things mentioned in that act and not to have intended that the definition in that act should be construed or used as explaining the meaning of the word drug as contained in the pharmacy act."); *Klooster v City of Charlevoix*, 488 Mich 289, 305; 795 NW2d 578 (2011) (it is error to apply an act or section-specific definition beyond the intended scope).

[21] *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125; 894 NW2d 552 (2017) ("The omission of a provision in one part of a statute that is included in another part of the same statute should be construed as intentional."); *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210, 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is

omission and paper over the distinction between county road commissions and counties would be an improper usurpation of the legislative role.[22]

Second, MCL 224.6(7) doesn't give counties the authority to "absorb" their road commissions; rather, it enables counties to "dissolve" the road commission and *transfer* its powers. As the trial court observed, when an entity is "dissolved," the entity has ended, precluding the possibility of a successor in interest.[23] When statutory language is unambiguous, this Court applies its plain meaning as written.[24] The language of MCL 224.6(7) isn't ambiguous. It clearly authorizes counties to bring their respective road commissions "to an end" and "terminat[e]" their legal existence.[25] But it doesn't say anything about making the counties the successors-in-interest to the contractual rights of their terminated road commissions.

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not there."); *Reading Law*, p 93 ("Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.") (formatting altered).

[22] *People v Pinkney*, 501 Mich 259, 286 n 67; 912 NW2d 535 (2018), citing, e.g., *Malpass v Dep't of Treasury*, 494 Mich 237, 251, 833 NW2d 272 (2013) ("[T]o supply omissions transcends the judicial function." (citations and quotation marks omitted)); *Hobbs v McLean*, 117 US 567, 579, 6 S Ct 870, 29 L Ed 940 (1886) ("When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."); and Crawford, *Construction of Statutes* (1940), § 169, p 269 ("Omissions in a statute cannot, as a general rule, be supplied by construction. ... As is obvious, to permit the court to supply the omissions in statutes, would generally constitute an encroachment upon the field of the legislature.").

[23] (Summary Disposition Order at 14 n 36, citing *Black's Law Dictionary* (10th ed. 2014), App'x at ___); see also *Black's Law Dictionary* (11th ed. 2019) (defining "dissolution" as "[t]he act of bringing to an end; termination" and "[t]he termination of a corporations legal existence…by legislative act…or by other means"); and *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014) (defining "dissolve" as "to bring to an end: terminate").

[24] *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999) ("When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case."); *Pace v Edel–Harrelson*, 499 Mich 1, 6; 878 NW2d 784 (2016) ("When the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted.").

[25] MCL 224.6(7).

Third, MCL 224.6(7) doesn't encompass the transfer of any contractual rights or obligations. It merely authorizes the county board of commissioners to exercise the *functions* of the former road commission that "are otherwise provided by law"—i.e., by statute, regulation, or common-law. Stated differently, the Counties' decision to transfer their respective former road commissions' "powers, duties, and functions" under MCL 224.6(7) has nothing to do with the road commissions' contractual rights and obligations related to any third party, i.e., the Pool.

By its plain language, MCL 224.6(7) only transfers those powers, duties and functions "provided by law." Law is "[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action."[26] It is "impos[ed] by a sovereign authority."[27] In contrast, a contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."[28] Michigan's courts have recognized that "[a] contract is not the 'law.' Rather, a contract is enforceable *under the law*."[29]

The "powers, duties, and functions" that county road commissions are "provided by law" include the duty to keep county road systems, bridges, and culverts in reasonable repair;[30] the duty to maintain traffic control devices on roads within their jurisdiction;[31] and the power to enter contracts for road construction and maintenance equipment.[32] County road commissions

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[26] *Black's Law Dictionary* (11th ed. 2019); see also *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014) (defining "law" as "a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority" and "the whole body of such customs, practices, or rules").
[27] *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014).
[28] See *Black's Law Dictionary* (11th ed. 2019).
[29] *People v Parlovecchio*, 319 Mich App 237, 243; 900 NW2d 356 (2017) (emphasis in original).
[30] MCL 224.21(2); *Hargis v City of Dearborn Heights*, 34 Mich App 594, 598-599; 192 NW2d 44 (1971).
[31] MCL 257.610(1).
[32] MCL 247.663b.

also have the power to enter into intergovernmental contracts to form self-insurance pools.[33] But there are no provisions of "law" that govern the operations of those pools or obligate county road commissions to join a specific self-insurance pool—i.e., the Pool. On the contrary, the operation of statutorily authorized municipal self-insurance pools like the Pool is entirely a creature of contract—the Pool's governing documents—not "law." It follows then, that, to the extent the Ingham, Jackson, or Calhoun County Road Commissions had any rights or obligations provided by the Pool's governing documents that survived their dissolution (they didn't), those rights and obligations were not "powers, duties, and functions…provided by law" that could be transferred to the respective Counties under MCL 224.6(7).

Here, in *Ingham I*, the Court of Appeals rejected the argument that the Counties were not successors for the purpose of the Pool as a "stilted" reading of MCL 224.6(7). The court reasoned that if counties aren't contractual successors-in-interest to their dissolved road commission for the purpose of the Pool, then road commission property would become ownerless. (*Ingham I* at 4, App'x at 0661a). That's wrong. The authority for road commissions to hold title or interest in land, purchase real or personal property, or hire personnel is derived from statutes enacted by the legislature.[34] The same is true of a road commission's ability to join self-insurance pools, generally. So each of the actions listed-above actions fall within the "powers, duties, and functions…provided by law" to a road commission that may be properly transferred to a county board of commissioners under MCL 224.6(7).

But the Counties' purported right to surplus-equity distributions allegedly owed to the dissolved road commissions under a specific contract—i.e., the Pool's governing documents—

[33] MCL 124.1 *et seq.*
[34] MCL 224.9(3); MCL 224.10(3)-(5); MCL 224.11(4); MCL 224.19(5).

doesn't have any basis in "law"; rather, it is purely a creature of contract. So, it doesn't fall within the bundle of things that are transferrable under MCL 224.6(7); rather, succession of such a right (to the extent it even exists) would be governed by the language of the contract. The problem the Court of Appeals identified to recast counties as road commissions for purposes of contractual relations with the Pool—the specter of ownerless vehicles and land post-dissolution—is illusory.

The Court of Appeals also reasoned that, if the road commissions were dissolved without transferring their contractual rights under the Pool to the Counties, then those road commissions' contracts would be impaired in violation of Article 1, § 10 of Michigan's Constitution. (*Ingham I*, App'x at 0657a). Not so.

Legislation is prohibited from impairing the obligation of contracts under both the Michigan and U.S. Constitutions.[35] "These clauses provide that vested rights acquired under a contract may not be destroyed by subsequent state legislation."[36] To determine whether a statute substantially impairs an existing contract, Michigan courts apply a three-pronged test, "with the first prong being a determination 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'"[37] The first prong "requires [the] consideration of three factors: '[1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial.'"[38] Importantly,

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[35] *AFT Mich v Michigan*, 497 Mich 197, 232-233, 86 NW2d 782 (2015).
[36] *Seitz v Probate Judges Retirement Sys*, 189 Mich App 445, 45, 474 NW2d 125 (1991); *In re Certified Question,* 447 Mich 765, 777, 527 NW2d 468 (1994) ("It has been said that the purpose of the Contract Clause is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements.").
[37] *In re Certified Question*, 447 Mich 765, 777, 527 NW2d 468 (1994) (citation omitted); See also *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 21, 367 NW2d 1 (1985).
[38] *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 408, 878 NW2d 891 (2015) (citation omitted).

though, under this analysis, "'an impairment takes on constitutional dimensions only when it interferes with reasonably expected contractual benefits.'"[39] Only if the statute under review substantially impaired a contractual relationship, must the courts then turn to the second and third prongs—i.e., determining whether "the legislative disruption of contract expectancies [is] necessary to the public good," and whether "the means chosen by the Legislature to address the public need are reasonable."[40]

Here, nothing in the plain language of MCL 224.6(7) destroys any vested rights or interferes with any reasonably expected contractual benefits by permitting counties to transfer their road commissions' statutory "powers, duties, and functions" after dissolving them. To begin, counties don't have to dissolve their road commissions at all. Most have not. If there has been any contractual "impairment," it was entirely self-inflicted by the counties.

What's more, as just discussed, the road commission's power to own real property and equipment is statutory, so it's part of the bundle of things that are transferrable pursuant to MCL 224.6(7). As a result, that statute can't impair any of those contracts. In fact, the only way that the dissolution of a road commission could possibly impair a contractual obligation is if the county—as the successor-in-interest to the road commission's statutory rights—failed to perform a preexisting contractual obligation.

By contrast, it is the Court of Appeals' interpretation of MCL 224.6(7) in *Ingham I* that substantially impairs the contractual relationships between the Pool, these Counties, and the Pool's road commissions. With respect to the first prong, the Court of Appeals' holding impairs the Pool's governing contractual documents by: (1) interfering with the settled expectation that

[39] *Id*. at 413-414, 878 NW2d 89, quoting *Borman, LLC v 18718 Borman, LLC*, 777 F3d 816, 826 (CA 6, 2015).
[40] *In re Certified Question*, 447 Mich at 777, 527 NW2d 468.

only road commissions, and not counties, can be members; (2) eliminating the Pool's discretion to decline to issue surplus equity refunds; and (3) transmogrifying the contingent, discretionary benefit of surplus equity refunds into a vested, non-discretionary right to those benefits.

As for the second prong, this disruption of the Pool's (and its members') contractual expectancies is unnecessary for, and does not benefit, the public good. In fact, it disrupts the public good to the extent that it destabilizes the Pool and its members, deterring them from their purposes and goals of maintaining county road systems in reasonable repair and improperly transfers Pool funds that belong to the Pool and its current members, not withdrawn members.

The third prong requires that the means chosen by the Legislature to address the public need be reasonable. And it was unreasonable for the Court of Appeals to vitiate and change these contractual relationships that were in existence and enforced for years before the Legislature allowed for Counties to dissolve their road commissions. So, to the extent principles of anti-contractual impairment are relevant, they militate against the Court of Appeals' ruling.

In sum, the Court of Appeals' successors-in-interest holding wasn't based on the plain language of the relevant statutory provisions. Instead, it was based exclusively on the court's assumptions that: (1) if the road commissions were statutorily obligated to conduct highway maintenance and repair, and (2) if their counties transferred that function after dissolving the road commissions, then the counties would succeed to all interests of their former road commissions, including those that were purely contractual in nature. There is nothing in law or fact to support those assumptions, and neither the Counties nor the court cited any authority to support it. Indeed, the Court of Appeals' successor-in-interest holding is directly contrary to the Legislature's decision to limit the transferable rights and duties to those "provided by law." MCL 224.6(7). So, like the trial court, this Court should apply the plain language and reverse the Court

of Appeals' conclusion that the Counties bestowed themselves with contractual successor-in-interest status by "dissolving" their respective road commissions.

B. The road commissions didn't have a right to surplus equity distribution. And the Counties can't have greater rights than the road commissions they dissolved. So the Counties are not "entitled" to anything.

Even if the Counties are successors in interest to their Road Commissions' rights under the Pool (they aren't), they still aren't "entitled" to surplus equity distributions. A "successor in interest" is "[s]omeone who follows another in ownership or control of property" and "retains the same rights as the original owner."[41] Generally, a successor "stands in the shoes" of the original party and acquires the "same rights as [it] possessed."[42] Crucially, the successor-in-interest's rights "can be no greater than the one…in whose shoes he stands."[43]

Here, the Pool's operative documents vest the Board with discretionary authority to make distributions if it determines that those funds will "not [be] required for loss funding,"[44] and also vest the Board with authority to develop a "method"[45] or "process" for "addressing accumulated equity . . . or accumulated funding deficienc[ies]" too.[46] Exercising that discretion, the Board may choose not to issue any refund, or surplus equity distribution, at all in a given year or for many years. So, based on the governing contractual documents, even *current members* aren't entitled to any undeclared refund or surplus equity distributions.

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[41] *Black's Law Dictionary* (11th ed, 2019).
[42] *First of Am Bank v Thompson,* 217 Mich App 581, 587, 552 NW2d 516 (1996); *Von Meding v Strahl*, 319 Mich 598; 30 NW2d 363 (1948) ("[S]uccessors…are entitled to the same rights" as the predecessor).
[43] *Gray v Lincoln Housing Trust*, 229 Mich 441, 446-447; 201 NW 489 (1924); *Continental Ins Co v HM Loud & Sons Lumber Co*, 93 Mich 139, 143; 53 NW 394 (1892) (a successor-in-interest to a cause of action "ha[s] the same rights of recovery, and no greater" than the original party); *Lutz v Dutmer*, 286 Mich 467, 485; 282 NW2d 431 (1938) (a successor to "the purchaser under a land contract is entitled to the same rights as the original purchaser").
[44] (Trust at Art VI, §9(f), App'x at 0006a).
[45] (ByLaws, Art X, App'x at 0028a).
[46] (ByLaws, Art XII, App'x at 0029a).

Furthermore, the Pool's operative documents have long provided that withdrawing members are *not* entitled to distributions after withdrawal.[47] Specifically, two of the governing Pool documents say that that the Board may "treat members who withdraw . . . differently and less favorably than the Pool treats members who continue in the Pool for future years."[48] So, when a member withdraws, the Pool has the discretion to exclude that member from a distribution paid or payable after the withdrawal's effective date.

Consistent with that enabling authority, the Pool Board developed a twelve-factored methodology for the distribution computation process and chose to limit eligibility to those members who paid premiums in the relevant year, stayed in the Pool continuously after that, and *were members "at the date the refund [was] approved."*[49] In 1990, the Board reiterated those eligibility criteria and adopted a specific Policy to address distributions and withdrawing members: "A withdrawing Member *forfeits any and all rights to dividend[s*], credits and/or accumulated interest that is to be paid or shall become payable *after the effective date of the Member's withdrawal from the Poo*l."[50]

Accordingly, based upon the Pool's binding operational documents, the following points are true: (1) distributions are always discretionary, never guaranteed, (2) they only happen if the Board decides to declare one, (3) each coverage year is separate, (4) distributions only happen if the Board decides that the funds otherwise available will not be "required for loss funding," (5) if

[47] (See 7/19/90 MCRCSIP Withdrawal Policy Memo, App'x at 0686a). As early as 1990, the Pool's members were advised that the Pool's Board had adopted a Policy that "withdrawing Member[s] forfeit[ed] any and all rights to dividends, credits and /or accumulated interest that [was] to be paid or shall become payable after the effective date of the Member's withdrawal from the Pool." (*Id.*) This is a point that *Ingham I* failed to address altogether.
[48] (Trust, Art VI, §9(f), App'x at 0006a; Inter-Local Agreement §3(H), App'x at 0035a).
[49] (MCRCSIP Refund Overview, App'x at 0043a).
[50] (7/19/90 MCRCSIP Withdrawal Policy Memo, App'x at 0686a (emphasis added)).

the Board decides to distribute, there is a multi-factored analysis that is employed to determine who gets what, and, in all events, and (6) members who withdraw are not "entitled" to anything.

Furthermore, the withdrawing Road Commissions involved in this case knew—or should have known—about these restrictions. Indeed, before dissolving their Road Commissions, the Counties *knew* that they were no longer entitled to distributions after they withdrew from the Pool. As such, even if the Counties are successors in interest, and even if they are eligible to be Pool members, their rights and remedies against the Pool are necessarily no greater than the rights and remedies of their dissolved road commissions.[51] If the predecessor road commissions were not entitled to any distribution after they withdrew from the Pool (they weren't), then the Counties would have the same right—none—to distributions as successors in interest, whether under a breach of contract or any other theory.

The Michigan Constitution authorized the Legislature to "provide for county road commissioners . . . with the powers and duties provided by law." Const 1963, art 7, § 16. The Legislature did that by enacting MCL 224.1 *et seq*., which outlines the methodology for setting them up and further defines them as "bod[ies] corporate," MCL 224.9. As authorized by MCL 124.5, Michigan road commissions in turn organized the defendant Pool. The Pool was created by a Declaration of Trust and is governed by its By-Laws and the individual Inter-Local Agreements signed by its member Road Commissions. Importantly, only road commissions can be members according to the By-Laws, and the Pool Board controls whether or when new road commission members may be added to the Pool. Hence, under the Pool's operating documents,

[51] *First of Am Bank v Thompson,* 217 Mich App 581, 587, 552 NW2d 516 (1996); *Von Meding v Strahl*, 319 Mich 598; 30 NW2d 363 (1948) ("[S]uccessors…are entitled to the same rights" as the predecessor); *Gray v Lincoln Housing Trust*, 229 Mich 441, 446-447; 201 NW 489 (1924); *Continental Ins Co v HM Loud & Sons Lumber Co*, 93 Mich 139, 143; 53 NW 394 (1892).

counties are ineligible for membership, and even if they were eligible, they cannot become members of the Pool unless the Pool board, by a two-thirds vote, allows them in. That has never happened here. In fact, the Plaintiff Counties knew that the Pool had, by vote of its members, rejected amendment of the By-Laws to allow Counties as members, and these Counties accepted that result. They charted their own individual courses and obtained other insurance.

While the Court might accept here that the Plaintiff Counties are successors in interest to their road commissions or that they were eligible for Pool membership, those things are of no consequence when their predecessors in interest, the dissolved road commissions, withdrew and forfeited any right to equity surplus distributions. As a result, the Counties forfeited any right to claim refunds, too. Again, under Michigan law, the Counties can claim no more than their former road commissions.[52]

This Court's opinion in *Michigan Dep't of Natural Resources v Carmody-Lahti Real Estate Inc*, 472 Mich 359; 699 NW2d 272 (2005), is illustrative. That case involved a railroad right of way that the DNR claimed it had a right to use as a snowmobile and recreation trail.[53] In 1873, the Quincy Mining Company conveyed an interest in real property in Houghton County to the Mineral Range Railroad Company.[54] The interest was labeled a "right of way" in the written deed.[55] The DNR sought to enjoin the landowner from blocking the right of way from

[52] *First of Am Bank v Thompson,* 217 Mich App 581, 587, 552 NW2d 516 (1996); *Von Meding v Strahl*, 319 Mich 598; 30 NW2d 363 (1948) ("[S]uccessors…are entitled to the same rights" as the predecessor); *Gray v Lincoln Housing Trust*, 229 Mich 441, 446-447; 201 NW 489 (1924); *Continental Ins Co v HM Loud & Sons Lumber Co*, 93 Mich 139, 143; 53 NW 394 (1892).
[53] *Id.* at 361-362.
[54] *Id.* at 362-363.
[55] *Id.*

snowmobiling and recreational use.[56] The DNR asserted fee simple ownership of the "right of way" that had been deeded to the railroad.[57]

After noting that the Michigan DNR is the "successor in interest" of the Mineral Range Railroad Company, this Court rejected that argument.[58] It held that the Mineral Range Railroad Company had acquired only an easement by deed of a "right of way," and that the railroad had abandoned that right of way and had therefore abandoned its easement.[59] Though the DNR was a successor in interest to the railroad company, it couldn't acquire an easement that its predecessor in interest, the railroad company, had abandoned.[60]

The same is true here. After they withdrew from the Pool (either by express agreement or by dissolution), the withdrawn county road commissions weren't entitled to any refund of any prior surplus contributions. So, even if the Counties are successors-in-interest to their predecessors in interest (the dissolved road commissions), they don't have any right to a refund either. Indeed, it is legally impossible for the Counties to succeed to a greater legal right to refunds than their respective road commissions possessed.[61]

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[56] *Id.* at 366.
[57] *Id.* at 362, 366.
[58] *Id.* at 362, 370.
[59] *Id.* at 378, 384-388
[60] *Id.* at 388.
[61] *Von Meding v Strahl*, 319 Mich 598; 30 NW2d 363 (1948) ("[S]uccessors…are entitled to the same rights" as the predecessor). Numerous other courts have reached the same conclusion. See, e.g., *US Bank Nat'l Ass'n v Cox*, Mo Ct of App, WD, 341 SW3d 846, 2011 WL 2118883 (2011); *City of Aurora ex rel. its Utility Enterprise v Northern Colo Water Conservancy Dist*, S Ct of Colo, *en banc*, 236 P3d 1222, 2010 WL 2991381 (2010); *City of Hernando v North Miss Utility Co*, Ct of App of Miss, 3 So 3d 775, 2008 WL 4040634 (2008); *Society Nat'l Bank v Security Fed S & L*, S Ct of Ohio, 71 Ohio St 3d 321, 643 NE2d 1090 (1994); *Franklin v Spencer*, S Ct of Or, 309 Or 476, 789 P2d 643 (1990); *Ross v Colonial Bank*, S Ct of Conn, 207 Conn 483, 542 A2d 1112 (1988); *Romero v State*, S Ct of NM, 97 NM 569, 642 P2d 172 (1982); *Grey v Wilson*, Ct of App of Kentucky, 554 SW2d 867 (1977).

In sum, the Counties have not established that they or their road commissions are entitled to anything. For the purposes of the Pool's governing documents, the Counties are not successors-in-interest to their former road commissions. But, even if they were, it wouldn't matter. Under well-established principles of Michigan law, the successors-in-interest are only entitled to the same rights as their predecessors—and nothing greater. And, under the Pool's governing documents, the former road commissions were never entitled to any future surplus equity distributions, especially once they withdrew. So, the Counties aren't entitled to anything, either. The Court of Appeals erred by ruling to the contrary. This Court should reverse that error.

II. Jackson County is not and cannot be a member of the Pool.

A. Counties aren't eligible for Pool membership. So the Jackson County Road Commission withdrew from the Pool when Jackson County dissolved it, regardless whether it signed a withdrawal agreement.

This section addresses the second of this Court's questions – "…whether the Court of Appeals properly held that plaintiff Jackson County was a member of the Michigan County Road Commission Self-Insurance Pool (pool) despite having dissolved its road commission." The short answer is no, because Jackson County is a "county," not a "road Commission." Pool membership is open only to "road commissions" by the Pool's founding documents, by the unwavering intent of its members as expressed there, by over 40 years of practice by the Pool and its members consistent with that intent, by the Michigan Constitution, and by legislation authorizing creation of the self-insurance pool among "road commissions."

Jackson County is situated modestly different than Ingham County or Calhoun County because there is no evidence that Jackson County's road commission executed the Withdrawal Agreement the Pool sent it. In contrast, the two other road commissions agreed to withdraw from the Pool as memorialized by explicit contracts: their withdrawal agreements. It is undisputed that Jackson County studied, deliberated, and chose to dissolve its road commission; Jackson County

did so with full knowledge that the Pool would not consider the County to be eligible for membership in the Pool; and that the Pool would enforce the consequences that arose from Pool/member agreements. In short, Jackson cannot be a road commission entitled to Pool membership, regardless of the fact that it might not have signed a withdrawal agreement.

When Jackson County dissolved its road commissions, it knew that the Pool's members had already rejected a proposed amendment to the Pool's Bylaws that would have paved the way for Counties to become members. Pool membership was, and remained, limited to "county road commissions."[62] Counties are not "road commissions." Ingham and Calhoun Counties affirmatively recognized that was so, without any quarrel, in their withdrawal agreements. And while Jackson did not sign a withdrawal agreement, the fact remains that Jackson County, as a county, could not be a member of the "road commission" Pool.

That "counties" and "road commissions" are separate and distinct subdivisions of the state is evident in Michigan constitutional and statutory law. The Michigan Constitution authorized the Legislature to "provide for county road commissioners. . . with the powers and duties provided by law." Const 1963, art 7, § 16. The Legislature did that by enacting MCL 224.1 et. seq., which outlines the methodology for setting them up, and further defines them as "bod[ies] corporate," MCL 224.9. As authorized by MCL 124.5, Michigan road commissions in turn organized the Pool. As noted previously, the Pool was created by a Declaration of Trust and is governed by its By-Laws and the individual Inter-Local Agreements signed by its member road commissions. (Trust, App'x at 0001a; By-Laws, App'x at 0014a; Inter-Local Agreements,

[62] That "counties" remain distinct from "county road commissions" after dissolution is evident in MCL 691.1401(b), which continues to define each as political subdivisions of the state. A county remains a "county", separate and distinct from "county road commissions." It cannot possibly come within the Pool's definition of "county road commissions" because it is not one, regardless of the county assuming the former road commission road maintenance functions.

App'x at 0031a). Importantly, only road commissions can be members. (By-Laws, Art III and IV, App'x at 0016a – 0017a). And the Pool Board controls whether or when new road commission members may be added to the Pool. (Trust, Art VI, Sec 6, App'x at 0005a; By-Laws, Art IV, App'x at 0017a). Hence, under the Pool's operating documents, Counties are ineligible for membership and, in any event, they cannot become members of the Pool unless the Pool Board, by a two-thirds vote, allows them in. That has not happened.

Despite all this, the Court of Appeals concluded as a matter of law that the Counties are automatically eligible for Pool membership. And since this decision is published, other counties could claim automatic membership in the Pool in the future. What the Court said in *Ingham County I* is this:

> The Pool's bylaws limit membership to county road commissions, but the bylaws do not define a county road commission. Instead, the bylaws refer to the statutory authority of county road commissions. Because we concluded that the counties were successors in interest to their dissolved road commissions as a matter of statutory interpretation, we likewise conclude that the successor counties are eligible for Pool membership by virtue of the statutory reference to county road commissions and the Pool's bylaws. [*Ingham I* at 5, App'x at 0662a.]

This conclusion is wrong. As the Court of Appeals noted, courts must construe bylaws using the same rules that apply to contract interpretation. (*Id.* at 5.) But, a court's "goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself."[63] "An unambiguous contractual provision is reflective of the parties' intent as a matter of law," and "[i]f the language

[63] *Wyandotte Electric Supply Co. v Electrical Technology Sys., Inc.*, 499 Mich 127, 143-144, 881 NW2d 95 (2016).

of the contract is unambiguous, [this Court must] construe and enforce the contract as written."[64] "A contractual term is ambiguous on its face only if it is equally susceptible to more than a single meaning" or "if two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous."[65]

Here, nothing about the term "county road commission" is ambiguous. So, under the case law cited above, the Court of Appeals wasn't free to read its assumptions about what the parties really meant into to contract. Instead, the court was required to apply the term as written, without further interpretation. And as noted above, the term "county road commission" means something different than "county," including under both the enabling statutes that authorized the creation of the Pool and the statute that authorized the Counties to dissolve their road commissions.[66] A "county road commission" is a statutorily created corporate body, governed by a board of county road commissioners, that is responsible for maintain the roadways under its jurisdiction.[67] In

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[64] *Quality Products & Concepts Co. v Nagel Precision, Inc.*, 469 Mich 362, 375; 666 NW2d 251 (2003); *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008) ("If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law."); *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 86; 878 NW2d 816 (2016) ("If the language of a contract is unambiguous, we must enforce the contract as written."); *Rory v Continental Ins. Co.*, 473 Mich 457, 468, 703 NW2d 23 (2005) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written.").

[65] *Kendzierski v Macomb County*, 503 Mich 296, 311; 931 NW2d 604 (2019), quoting *Barton-Spencer v Farm Bureau Life Ins. Co. of Mich*, 500 Mich 32, 40, 892 NW2d 794 (2017) and *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 467, 663 NW2d 447 (2003); see also *Mayor of City of Lansing v Michigan Public Service Com'n,* 470 Mich 154, 166, 680 NW2d 840 (2004) (ambiguity arises where a provision of the law " 'irreconcilably conflict[s]' with another provision ... or where it is *equally* susceptible to more than a single meaning").

[66] See MCL 124.1(a); Cf. MCL 224.6(1)-(4); MCL 224.8 (same); see also *United States Fidelity,* 484 Mich at 14 ("When the Legislature uses different words, the words are generally intended to connote different meanings."); see also 2A Sutherland, *Statutes and Statutory Construction*, § 46:6, p 261 ("Different words used in the same, or a similar, statute are assigned different meanings whenever possible."); *Reading Law*, p 170 ("A word or phrase is presumed to bear the same meaning through a text; a material variation in terms suggests a variation in meaning.").

[67] MCL 224.6; MCL 224.9(1)-(3); MCL 224.10(3)-(5); MCL 224.11(4); MCL 224.19(5)

contrast, a "county" is a geographic subdivision of the state that is governed by a "county board of commissioners," and that is responsible for a wide variety of delegated public functions that have nothing to do with county roadways.[68] So, there was no authority for the Court of Appeals to interpret the term "county road commission" in the By-Laws and the other relevant contractual documents as including the Counties after they dissolved their respective road commissions.

The Court of Appeals' decision violates bedrock principles of Michigan contract law. Parties are free to contract as they see fit, and the primary goal in interpreting contracts is to determine and enforce the parties' intent.[69] The parties to the Pool bylaws and other operative Pool documents agree on their meaning. Those documents express their intent that "county road commissions" means exactly that, and that the term "county road commissions" does *not* include counties that have dissolved their road commissions. The Court of Appeals was not free to interpret the Pool's bylaws and agreements in a contrary manner.

Another error implicit in the Court's analysis is that it assumes that the Counties can simply be substituted in the place of their dissolved county road commissions in the Pool without addressing the operative documents that prevent that from ever happening. Respectfully, the fact that the functions, property and employees of the respective road commissions have been transferred to the Counties does not mean that they are thereby eligible for Pool membership. To extend membership to, and write insurance coverage for, such Counties would require the Pool to completely re-write its governing documents, and coverages. The Court of Appeals ignored

[68] MCL 45.1; MCL 45.2; MCL 45.3; MCL 46.1 *et seq*.; MCL 46.11(a)-(r). The county board of commissioners also has several road-related powers, including the authority to "adopt[] a county road system with a board of county road commissioners" or dissolve such a body (which implies that they are a separate entity). MCL 46.11(s)-(u).

[69] *Wilkie v Auto Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003); *51382 Gratiot Ave Holdings LLC v Chesterfield Development Co LLC*, 835 F Supp 2d 384 (ED Mich, 2011).

that reality and offered no explanation for its judicial amendment of the Pool's governing documents.

Each of the now withdrawn road commissions, like all other Pool members, signed Inter-Local Agreements which defined the coverage available through the Pool—general liability, auto liability, umbrella liability, and public officials' errors and omissions liability. (Inter-Local Agreement at §13, App'x at 0039a). The insurance posed by a county's "general liability" and a county road commission's "general liability" are vastly different in kind and scope. Substituting a county for a road commission would, at minimum, require drastic revisions of the Inter-Local and insurance coverage agreements. And the insurance coverages would have to be rewritten in a manner that would parse county commissioners and their functions, county employees, county vehicles, county buildings and properties, etc. Placing these counties into the shoes of their former road commissions is not a simple matter. Counties have a much bigger footprint. Without drastic changes to county structures, Pool bylaws, and the Inter-Local agreements, Counties cannot be eligible for Pool membership.

In conclusion, Jackson County cannot be a member of the Pool because it is, by definition, a "county" and not a "road commission" and Pool membership is limited to road commissions. With regard to the other two plaintiffs, Ingham and Calhoun counties, they are also prohibited from Pool membership for that very same reason. In addition, they accepted and executed agreements for withdrawal from the Pool. In short, all three counties chose to dissolve their road commissions knowing that they could not be Pool members, anticipating the consequences that followed from their choices. They analyzed the finances, the manner in which they would then have to discharge of their duties to maintain roadways without a separate road commission. Having made the analysis, they chose to go in that direction. And now they claim

foul and ask the Court to hammer them into the Pool in derogation of the language of the Pool's governing documents and relevant statutes. The Court must conclude that they are wrong, and that the Court of Appeals has wrongly decided this matter.

III. The forfeiture provisions in the Pool's government documents are not unenforceable as against public policy, and the Plaintiff Counties did not preserve this issue in any event.

A. The Public-Policy Doctrine.

In Michigan, it's well-established that "the duty of the judiciary is to assert what the law 'is,' not what it 'ought' to be."[70] Thus, when confronted with an argument that a contract is unenforceable as against "public policy," courts must exercise great caution[71] because "[t]he public policy of Michigan is not merely the equivalent of the personal preferences of a majority of [the] Court."[72] Rather, "[i]n identifying the boundaries of public policy, . . . the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our *state and federal constitutions, or statutes, and the common law*."[73]

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[70] *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002), citing *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803).

[71] see, *e.g.*, *Skutt v City of Grand Rapids*, 275 Mich 258, 263-264; 266 NW 344 (1936), quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 256-257; 51 S Ct 476; 75 L Ed 1112 (1931); *Pitsch v Blandford*, 264 Mich App 28, 31; 690 NW2d 120 (2004) ("Courts must proceed with caution in determining what exactly constitutes Michigan's 'public policy,' and not merely impose its belief of what public policy should be.").

[72] *Terrien*, 467 Mich at 67; *Rory v Continental Ins Co*, 473 Mich 457, 470-471; 703 NW2d 23 (2005).

[73] *Terrien*, 467 Mich at 66-67 (Emphasis supplied). But, "it does not necessarily follow that every statutory or regulatory violation by one of the contracting parties renders the parents' contract void and unenforceable." *Johnson v QFD, Inc*, 292 Mich App 359, 365; 807 NW2d 719 (2011); see also *Maids In't, Inc v Saunders, Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997) (holding that the franchise agreements at issue were not unenforceable as a matter of public policy because the Legislature had already set forth remedies in the Franchise Investment Law for the specific violation committed by the plaintiff); *Muschany v United States*, 349 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945) ("Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.").

Exercising such caution protects the "fundamental policy of freedom of contract" under which "parties are generally free to agree to whatever specific rules they like."[74] In Michigan, "competent persons . . . have the utmost liberty of contracting and . . . their agreements voluntarily and fairly made shall be held valid and enforced in the courts."[75] Indeed, it is "*the* bedrock principle of American contract law that parties are free to contract as they see fit."[76]

As a result, this Court has cautioned against decisions that "would accord the judiciary the power to examine the wisdom of private contracts in order to enforce only those contracts it deems prudent."[77] Instead, "absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good."[78] Mere allegations of unfairness are also insufficient to invalidate a contract.[79]

To hold a contract unenforceable as against public policy, the policy "must ultimately be *clearly rooted* in the law."[80] That is, there "must be . . . *definite indications* in the law of the sovereign to justify the invalidation of a contract as contrary to that policy."[81] And "such . . .

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[74] *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 319; 550 NW2d 228 (1996), quoting *Dep't of Navy v Fed Labor Relations Authority*, 962 F2d 48 (1992); see also *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 387; 525 NW2d 891 (1994) ("As a general proposition, parties are free to enter into any contract at their will, provided that the particular contract does not violate the law or contravene public policy.").

[75] *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931).

[76] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).

[77] *Terrien*, 467 Mich at 69-70.

[78] *Id.* at 70.

[79] *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708; 706 NW2d 426 (2005) ("[T]his Court cannot rely on a litigants' subjective views of fairness to establish the public policy of the state.").

[80] *Terrien*, 467 Mich at 67 (emphasis added).

[81] *Id.* at 68, quoting *Muschany v United States*, 349 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945) (internal quotation marks omitted) (emphasis added).

public policy must not only be '*explicit*,' . . . it also 'must be *well defined and dominant*.'"[82] Thus, a contract is only unenforceable to the extent it "is in conflict with the statute."[83]

This Court has recognized that courts should only void contracts as contrary to public policy in "highly unusual circumstance[s]."[84] Applying these principles, Michigan courts have sparingly invalidated contracts as against public policy under limited circumstances: (i) a contract between two fathers to arrange the marriage of their children,[85] (ii) a contract requiring an attorney to share legal fees with a nonlawyer in violation of the Michigan Rules of Professional Conduct,[86] (iii) a contract between a medical provider and a patient absolving the provider from liability for the negligence of its employees before receiving medical treatment,[87] and (iv) a no-fault insurance policy that prohibited assignment of any interest without the insurer's consent.[88] But the vast majority of contractual arrangements necessarily survive a public policy challenge even if they result in what someone might perceive to be a degree of unfairness or inequity: (i) a commercial insurance policy that computed coinsurance based on

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[82] *Id.* at 67, quoting *WR Grace & Co v Local Union 759*, 461 US 757, 766; 103 S Ct 2177, 76 L Ed 2d 298 (1983) (emphasis added); *Rory*, 473 Mich at 472, 474, 476 (a contract must violate "explicit" public policy to be void).
[83] *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 599-601; 648 NW2d 591 (2002).
[84] *Kendzierski v Macomb County*, 503 Mich 296, 311; 931 NW2d 604 (2019); *Mann v Pere Marquette R. Co.*, 135 Mich 210, 219, 97 NW 721 (1903), citing *Baltimore & O S W R Co v Voigt,* 176 US 498, 504, 20 S Ct 385, 44 L Ed 560 (1900) ("[T]he usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy....").
[85] *Muflahi v Musaad*, 205 Mich App 352, 353; 522 NW2d 136 (1994) (invalidating the contract as an unenforceable marriage brokerage contract).
[86] *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 59; 672 NW2d 884 (2003); see also *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002) ("[I]t is clear the Supreme Court agreed with the fundamental principle that contracts that violate our ethical rules violate our public policy and therefore are unenforceable.").
[87] *Cudnik*, 207 Mich App at 387.
[88] *Henry Ford Health System v Everest Nat'l Ins Co*, 326 Mich App 398, 405; 927 NW2d 717 (2018).

replacement cost coverage even though the valuation was based on actual cash value,[89] (ii) contracts that shorten statutory limitation periods,[90] and (iii) an agreement to share proceeds of lottery winnings.[91] In each instance, application of a public policy challenge is contract- and circumstance-specific.

B. Neither the Pool's withdrawal policies nor its governing documents violate Michigan's "explicit" public policy.

In in its opinion in *Ingham III*, the Court of Appeals concluded that the withdrawal policy signed by Ingham and Calhoun Counties, and the Pool's governing documents, were void as against public policy to the extent they enabled the Pool to decline to issue surplus equity distributions to the Counties after their road commissions signed the withdrawal agreements and were dissolved. Specifically, the Court of Appeals said the Pool's contracts conflicted with four statutes—MCL 124.5, MCL 46.11(s), MCL 224.6(7), and MCL 500.2016. That was wrong.

This Court has held that a contract is only unenforceable on public policy grounds to the extent it "is in conflict with the statute."[92] But neither the withdrawal policy nor the Pool's governing documents actually conflict with any of the statutes listed in the Court of Appeals' opinion. Indeed, the public policy that the Pool's documents allegedly violated isn't clearly rooted—let alone "explicit" or "well defined [or] dominant"—in any of the four identified statutes or in any other law.[93]

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[89] *Royal Property Group, LLC*, 267 Mich App at 726 (explaining further that the insurer's business practices were not fraudulent or deceptive because the "insured is obligated to read the insurance policy," and the coinsurance clause "gives plain and unambiguous instruction').
[90] *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005) ("Michigan has no general policy or statutory enactment prohibiting the contractual modification of the periods of limitations provided by statute.").
[91] *Miller v Radikopf*, 394 Mich 83, 86-88; 228 NW2d 386 (1975).
[92] *Cruz*, 466 Mich at 599-601.
[93] *Terrien*, 467 Mich at 67 (citations omitted).

1. Neither the withdrawal policy nor the Pool's governing documents conflict with any "explicit" or "clearly rooted" public policy embodied in MCL 124.5(6).

The Court of Appeals held that the withdrawal policy and the Pool's governing documents were unenforceable because they violated the public policy embodied in MCL 124.5(6), which is part of the Intergovernmental Contracts Between Municipal Corporations Act. That provision states that:

> The legislature hereby finds and determines that insurance protection is essential to the proper functioning of municipal corporations; that the resources of municipal corporations are burdened by the securing of insurance protection through standards carriers; that proper risk management requires spreading risk to minimize fluctuation in insurance needs; and that, therefore, all contributions of financial and administrative resources made by a municipal corporation pursuant to an intergovernmental contract authorized under this act are made for a public and governmental purpose, and that those contributions benefit each contributing municipal corporation.[94]

In the Court of Appeals' view, "MCL 124.5(6) makes clear [that] the Legislature intended governmental self-insurance pools to serve as a force that would *spread*—not concentrate—risk between municipal members, and to *minimize*—not accentuate—fluctuations. (*Ingham III*, Slip op at 14, Appellant's App'x at 0680a). After finding that "the county is effectively a continuation of the dissolved road commission," the Court concluded that enforcing the withdrawal policy and Pool's governing documents as written would undermine the purpose of MCL 124.5(6). (*Id.*). Specifically, the Court of Appeals reasoned that "the forfeiture called for in the withdrawal policy would directly undermine the public purposes that the Pool is required to serve under MCL 124.5(6) [by] affording the remaining members of the Pool a comparatively small windfall (in the form of each one's pro rata share of the excess equity payments made by

[94] MCL 124.5(6).

the counties' former road commissions), while imposing a large, unexpected forfeiture on the three withdrawing counties." (*Id.*). The Court of Appeals is wrong for several reasons.

First, as a threshold matter, MCL 124.5(6) doesn't conflict with the withdrawal policy or the Pool's governing documents. Recall that, to void a contract "public policy must not only be '*explicit*,' . . . it also 'must be *well defined and dominant*.'"[95] And a contract is only unenforceable to the extent it "is in conflict with the statute."[96] Here, however, the plain language of MCL 124.5(6) doesn't prohibit self-insurance Pools from limiting their membership to certain types of governmental entities, from treating former members differently for the purposes of surplus equity distributions, or from requiring that members forfeit any surplus equity upon withdrawal from the pool. Thus, there is no "explicit" public policy in MCL 124.5(6) that prohibits a municipal self-insurance pool from doing anything of those things.[97] It follows that the Pool's governing documents don't contradict MCL 124.5(6) even though they limit membership to road commissions and allow the Pool to treat former members differently.

Second, the court's analysis was based on the faulty premise that the Counties were ever entitled to join the Pool as counties (not road commissions). The Court of Appeals says that the counties undertaking their former road commissions' duties after dissolving them are "effectively" the same as road commissions, and thus the Pool must accept them as Pool members. But, under the statutory framework for the Pool, the Legislature left it within the discretion of the individual self-insurance pools to determine which types of governmental units

[95] *Id.* at 67, quoting *WR Grace & Co v Local Union 759*, 461 US 757, 766; 103 S Ct 2177, 76 L Ed 2d 298 (1983) (emphasis added); *Rory*, 473 Mich at 472, 474, 476 (a contract must violate "explicit" public policy to be void).
[96] *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 599-601; 648 NW2d 591 (2002).
[97] *Rory*, 473 Mich at 472, 474, 476 (a contract must violate "explicit" public policy to be void).

are entitled to Pool membership.[98] And, as it's statutorily authorized to do, the Pool and its members have agreed that county road commissions are the only governmental entities that are allowed to be members of the Pool.

Furthermore, as shown above, counties are not road commissions.[99] They are two separate and distinct governmental entities established by Michigan law. And, as the governing documents demonstrate, the member road commissions, as members of the Pool, have decided that only road commissions may be members. As the Counties were fully aware of before they dissolved their respective road commissions, the Pool members (road commissions) would have needed to amend their Bylaws for the Counties to be able to join the Pool.

So long as the members and the Pool have observed the legislative requirements and acted reasonably within their authority, they should be able to define what types of entities can or cannot be members. And that makes sense—admitting counties to the Pool in addition to road commissions would do great violence to the Pool's foundational documents and insuring agreements. Counties have many more functions and duties than do road commissions, as well as more real estate and many more types of vehicles and equipment for other purposes too. This begs the question: if the Court of Appeals is correct and the Counties automatically became members of the Pool by dissolving their former road commissions, what portions of the Counties' operations fall within the scope of the Pool's insurance? The Court of Appeals'

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[98] See MCL 124.7.

[99] As noted above, for the purposes of MCL 124.5, "county" and "county road commission" are treated as separate entities. See MCL 124.1(a). Cf. MCL 224.6(1)-(4); MCL 224.8 (same). *United States Fidelity Ins*, 484 Mich at 14 ("When the Legislature uses different words, the words are generally intended to connote different meanings."); *Reading Law*, § 25; see also 2A Sutherland, *Statutes and Statutory Construction*, § 46:6, p 261 ("Different words used in the same, or a similar, statute are assigned different meanings whenever possible."); *Reading Law*, p 170 ("A word or phrase is presumed to bear the same meaning through a text; a material variation in terms suggests a variation in meaning.").

opinion assumes that the Counties can slip effortlessly into the shoes of their former Road Commissions as members of the Pool. But, as even a cursory comparison of the scope of a County with the scope of a road commission reveals that that's utter nonsense. The Court's decision forces the Pool to take on new and different members—i.e., members that are not road commissions—which is itself a violation of public policy

Third, the Court of Appeals' public policy analysis ran roughshod over what the statutes were intended to accomplish and promote – risk-sharing and providing stability in the insurance coverage market for municipal entities like road commissions. MCL 124.7 provides that pools like this one establishing self-insurance must "provide a plan of management," which, among other things, must (i) establish the "governing authority" of the Pool, (ii) fix contributions, maintain reserves, levy and collect assessments, and dispose of surpluses, (iii) outline "[t]he basis" on which "existing members may leave [] the pool," and (iv) include any "[o]ther provisions necessary or desirable for the operation of the pool."[100] But, although the statute vests pools with broad discretionary authority to make judgments about how best to accomplish that, the Court of Appeals ignored the Pool's exercise of that discretion and instead substituted its own preferences about how it thinks the Pool should have handled membership and surplus equity distributions.

The Pool properly exercised that discretion here, concluding that, for the long-term stability of the Pool, it made sense to treat withdrawing members differently and less favorably than those that choose to stay members. And that makes perfect sense. Those who choose to join the Pool know, going in, what to expect – and the plaintiff Counties in this instance knew the Pool's Policy regarding withdrawing members, long before they dissolved their road

[100] MCL 124.7(b)(i)-(v).

commissions and chose for them to withdraw from the Pool. There were no surprises at all, nor were there inequities. Because of the stabilizing effects of the Pool's membership policy, all Pool road commission members have enjoyed, for many years, the insurance coverage for which they paid.

In choosing to apply public policy the way it did, the Court of Appeals substituted its judgment about how the Pool should handle withdrawing members without considering the whole of what the Pool does and why, and the legitimate discretionary decisions it made about how best to accomplish the Pool's legitimate long-term objectives. In other words, the Court of Appeals stepped outside of its usual role—maintaining and enforcing contracts—and enabled the Counties to escape from inconvenient contractual provisions "on the pretext of public policy" that has no basis in Michigan law.[101] Using the public policy doctrine in that way – particularly where there is a reasonable and legitimate rationale for the decisions that the Pool made about how surplus contributions should be handled—flies in the face of the body of this Court's case law discussed above, including the direction that courts should apply the doctrine with "caution."[102]

Finally, the Court of Appeals took its extraordinary action to avoid what it perceived to be a "windfall." But there is no windfall. The Pool's members do not pay premium for future surplus-equity distributions (if such distributions ever happen at all). They pay premium for insurance coverage. And that is exactly what the withdrawn county road commissions received. There is no windfall in enforcing the agreement to which those former members freely agreed.

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[101] *Mann v Pere Marquette R. Co.,* 135 Mich 210, 219, 97 NW 721 (1903), citing *Baltimore & O S W R Co v Voigt,* 176 US 498, 504, 20 S Ct 385, 44 L Ed 560 (1900) ("[T]he usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy....").
[102] See *Skutt*, 275 Mich at 263-264.

In sum, the Court of Appeals recognized that the purpose of a government self-insurance pool is to spread, not concentrate, risk among municipal members. But the court's decision threatens the Pool's continuing existence. The bottom line is that the Pool's documents do not conflict with MCL 224.124.5(6). So they aren't void as a matter of public policy.

2. Neither the Pool's withdrawal policy nor its governing documents conflict with any public policy explicitly articulated in MCL 46.11(s) and MCL 224.6(7).

MCL 46.11(s) provides that "By majority vote of the members of the county board of commissioners elected and serving in a county with an appointed board of county road commissioners, pass a resolution that transfers the powers, duties, and functions that are otherwise provided by law for the appointed board of county road commissioners of that county to the county board of commissioners." Similarly, MCL 224.6(7) provides that "the powers, duties, and functions that are otherwise provided by law for an appointed board of county road commissioners may be transferred to the county board of commissioners by a resolution." Both sections provide that, if the county board of commissioners passes such a resolution, the county board of road commissioners is "dissolved."

In *Ingham III*, the Court of Appeals concluded that the Pool's withdrawal Policy and governing documents were contrary to the public policy articulated in MCL 46.11(s) and MCL 224.6(7) because they "penalize[d] the counties for exercising their rights to dissolve their road commissions under MCL 46.11(s) and MCL 224.6(7)." In other words, the court concluded that, when the Legislature granted the Counties the ability to dissolve their road commissions, any contractual provision that creates consequences for that decision is void as a matter of public policy—even where the contractual documents at issue preceded the dissolution (or MCL 224.6(7)) by two decades.

As the authority cited above demonstrates, Michigan courts do not strike contracts as violative of public policy for penalizing a party if they exercise certain rights. Rather, Michigan law requires that a contractual provision must "explicit[ly]" conflict with the text a statute to be void as against public policy.[103] Indeed, neither the Court of Appeals nor the Counties have ever cited any authority for the propositions that when the Legislature gives an entity the ability to do something, that entity must be free from any consequences if it chooses to do so, and that any preexisting contractual provisions that would impose consequences are void.

The simple truth is that a county's statutory authority to dissolve its road commission is not inconsistent with the former road commission's decision to contractually agree to forfeit any undeclared surplus equity distributions by withdrawing from the Pool (through formal agreement or dissolution). Because there is no conflict between the Pool's contractual agreements with the Counties and MCL 224.6(7) or MCL 46.11(s), there is no public policy violation that warrants voiding those documents. The Court of Appeals erred by ruling to the contrary.

3. MCL 500.2016 is irrelevant to whether the Pool's withdrawal policy and governing documents are contrary to public policy.

Finally, the Court of Appeals found that the Pool's withdrawal policy and governing documents were unenforceable because they conflicted with MCL 500.2016. In the court's view, that statute demonstrate that "our state's public policy disfavors self-insurers conditioning refunds of surplus insurance premiums on continued participation in [a] self-insurance pool…." (*Ingham III*, Slip op at 14-15, Appellant's App'x at 0680a – 0681a). But, as the Court of Appeals recognized, MCL 500.2016 "by its terms, only applies to workers' compensation insurance." (*Id.* at 15, Appellant's App'x at 0681a). As a result, any "explicit" public policy articulated by that statute is expressly limited to the workers-compensation-insurance context, and the Pool does not

[103] *Rory*, 473 Mich at 472, 474, 476 (a contract must violate "explicit" public policy to be void).

provide such coverage. So MCL 500.2016 has nothing to do with whether the Pool's withdrawal policy and governing documents are contrary to public policy, and the Court of Appeals reversibly erred by relying on it.

C. The Counties did not properly preserve—and, thus, waived—the issue of whether the Pool's governing documents are void as against public policy.

Michigan follows the party-presentation principle—i.e., Michigan courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."[104] Accordingly, a party needs to preserve an issue for an appellate court's review—otherwise, the issue is deemed waived.[105] Generally, to preserve an issue, a party must raise the issue in the trial court and pursue it on appeal.[106] As a result, issues that aren't raised in the trial court "are not available…on appeal."[107] Furthermore, parties must also provide trial courts with the authority necessary to support the issue.[108]

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[104] *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, 502 Mich 695, 709-710; 918 NW2d 756 (2018), quoting *Greenlaw v United States*, 554 US 237, 128 S Ct 2559, 171 L Ed 2d 399 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.");
[105] *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994) ("Generally, arguments not raised and preserved for review are waived.").
[106] *Peterman v State Dept of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994) ("In the instant case, plaintiffs raised the issue below and pursued it on appeal. Thus, the issue is appropriately before this Court.").
[107] *Therrian v General Laboraties, Inc*, 372 Mich 487, 490; 127 NW2d 319 (1964) ("Since defendant failed to raise such issues below, they are not available to it on appeal."); *Walters v Nadell*, 481 Mich 377, 389-390; 751 NW2d 431 (2008) ("Consistent with the rule against appellate review of issues not raised in the trial court, a plaintiff may waive the tolling of the period of limitations by failing to raise it in the trial court."); *People v Brott*, 163 Mich 150, 152, 128 NW 236 (1910) ("This court has often held that it will not review questions that have not been raised in the trial court, and such is the rule according to the great weight of authority."); *People v Grant*, 445 Mich 535, 546, 520 NW2d 123 (1994) ("[T]he courts of this state have long recognized the importance of preserving issues for the purpose of appellate review. As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal ....").
[108] *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008) ("Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute."); *Mitcham v City of Detroit*, 355 Mich 182, 203; 94

To adequately present an issue to the Court of Appeals for appellate review, a party must include the specific issue in their statement of the questions presented.[109] That is, any arguments that are "distinctly different" than the issues raised in the question presented are not preserved.[110] A party must also provide the reviewing court with both developed argumentation and adequate legal authority.[111]

NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.") (citations omitted).

[109] *Harper Woods Retirees Ass'n v City of Harper Woods*, 312 Mich App 500, 515; 879 NW2d 897 (2015) ("Issues not specifically raised in an appellant's statement of questions presented are not properly presented to this Court."); *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218; 625 NW2d 93 (2000) ("Plaintiff failed to preserve this issue by failing to raise it in the statement of questions presented."); *Butler v Simmons-Butler*, 308 Mich App 195, 210; 863 NW2d 677 (2014) ("To the extent that defendant claims that the trial court erred in awarding plaintiff attorney fees, defendant did not include this argument in her statement of questions presented on appeal."); *Henderson v Dept of Treasury*, 307 Mich App 1, 30; 858 NW2d 733 (2014) ("Issues must be raised in the petitioner's statement of questions involved in order to be properly presented for this Court's review.").

[110] *Butler v Simmons-Butler*, 308 Mich App 195, 210; 863 NW2d 677 (2014) ("Because the propriety of an attorney fee award is distinctly different from defendant's articulated challenge to the distribution of marital property, the attorney fee issue is not preserved.")

[111] *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (" It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.") *Goolsby v City of Detroit*, 419 Mich 651, 655; 358 NW2d 856 (1984) (holding that an issue wasn't preserved for appeal where the plaintiffs "made only a brief presentation which can hardly be classified as an argument…."); *Mudge v Macomb Co,* 458 Mich 87, 104-105; 580 NW2d 845 (1998) (where a party merely announces a position and provides no authority to support it, we consider the issue waived); *Caldwell v Chapman,* 240 Mich App 124, 132; 610 NW2d 264 (2000) (an appellant waives an issue by not including it in his statement of questions presented and not citing authority in support of the appellant's position); *Prince v MacDonald,* 237 Mich App 186, 197; 602 NW2d 834 (1999) ("It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court."); *Hammack v Lutheran Social Servs of Mich*, 211 Mich App 1, 7; 535 NW2d 215 (1995) ("A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim.").

Here, the Counties referenced "public policy" in some form or another at various points in the long and winding briefing history of this case. But they failed to preserve the issue that the Court of Appeals used to void the withdrawal policy and the Pool's governing documents.

First, the Counties failed to raise the issue in the trial court. In their summary-disposition motion, the Counties argued that it was against public policy for the Pool to attach consequences to their decision to dissolve their respective road commissions. (Counties' Summary-Disposition Motion at 17, 26-29, Appellant's App'x at 0604a, 0613a – 0616a). But they never argued that the Pool's governing documents were void because they conflicted with MCL 500.2016 or MCL 124.5(6)—i.e., the two statutes that the COA based its analysis on. (*Id.*) Furthermore, a review of the Counties' trial court briefing reveals that the public-policy point was merely a component of their argument that the Pool extorted them and violated Michigan's constitutional prohibition against municipalities lending their credit—which wasn't the basis for either *Ingham I* or *Ingham III*. (*Id.*)

Second, the Counties failed to raise the issue on appeal. In their briefing prior to *Ingham I*, the Counties waived any public-policy arguments (regardless of statutory basis) by failing to raise the issue in their statement of questions presented. (Counties' 10/25/16 COA Brief on Appeal at ix, Appellant's App'x at 0689a).[112] And although the Counties' pre-*Ingham III* supplemental brief mentioned "public policy" in its statement of questions presented, that still wasn't sufficient to present the issue for the Court of Appeals' consideration because it didn't

[112] The same is true with respect to the Counties' response to the Pool's first application for leave to appeal to this Court, which demonstrates that their public-policy argument was focused on their extortion claim. See Counties' 1/31/18 Response to the Pool's Application for Leave to Appeal at xiii.

reference any specific statutory provision and the body of the Counties' brief contained no supporting argument or authority. (Counties' Supplemental COA Brief at v, App'x at 0740a).

For multiple reasons, therefore, the Counties failed to preserve, and thus waived, the issue whether the withdrawal policy and the Pool's governing documents are void as contrary to the public policy articulated in MCL 500.2016, MCL 124.5(6), MCL 224.6(7), or MCL 46.11(s). It follows that the Court of Appeals shouldn't have addressed the issue.[113]

Conclusion & Relief Requested

For all of the reasons stated above, the Court of Appeals' panel in *Ingham I* reversibly erred by holding that the Counties are successors-in-interest to their former road commissions for the purposes of any contractual relations with the Pool, and that they are entitled to receive any undeclared surplus equity distributions after the date of dissolution. Similarly, the Court of Appeals' panel in *Ingham III* reversibly erred by holding that Jackson County never withdrew from the Pool and that the relevant contractual documents—including the withdrawal policy and the Pool's governing documents—were void as contrary to public policy. This Court should reverse those errors and remand to the trial court for entry of summary disposition in the Pool's favor.

[113] *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, 502 Mich 695, 709-710; 918 NW2d 756 (2018), quoting *Greenlaw v United States*, 554 US 237, 128 S Ct 2559, 171 L Ed 2d 399 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

DATED: November 4, 2020

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